

PATENT APPLICATION

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re application of

Docket No: Q94564

Fabien POULARD

Appln. No.: 10/577,850

Group Art Unit: 3771

Confirmation No.: 4893

Examiner: Christopher James BLIZZARD

Filed: May 24, 2007

For: FLUID PRODUCT SPRAYING DEVICE

REPLY BRIEF PURSUANT TO 37 C.F.R. § 41.41

MAIL STOP APPEAL BRIEF - PATENTS

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Sir:

In accordance with the provisions of 37 C.F.R. § 41.41, Appellant respectfully submits this Reply Brief in response to the Examiner's Answer dated August 25, 2010. Entry of this Reply Brief is respectfully requested.

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STATUS OF CLAIMS

Claims 1, 2, 4, 5, and 7-11 are pending in the application. Claims 3 and 6 have been canceled.

Claims 1, 2, 4, 5, and 7-11 stand rejected.

Claims 1, 2, 4, 5, and 7-11 are appealed.

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claim 1 is rejected under 35 U.S.C. § 102(b) as being anticipated by Tomaka (US Patent 6,651,844).

Claims 2, 4, 5 and 7-11 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Tomaka (U.S. 6,651,844) in view of Rocci (U.S. 6,138,669).

ARGUMENTS

I. CLAIM 1 IS REJECTED UNDER 35 U.S.C. § 102(b) AS BEING ANTICIPATED BY TOMAKA (US Patent 6,651,844).

The Examiner issued a new grounds of rejection as part of the Examiner's Answer, mailed August 25, 2010. The Examiner alleges that Tomaka discloses each of the elements of claim 1. Appellants address this rejection as follows.

A claim is anticipated when each feature of the claim is found in a single prior art reference.¹ Appellants respectfully submit that this criteria for establishing anticipation has not been met with regard to the above-identified claims.

A. Discussion Of The Reference

Tomaka is directed toward a spray dispenser counter. The spray dispenser counter counts actuations of a pump spray dispenser, and includes a button which is actuated by a user during the slidable movement of the nozzle to deliver a dose from the spray dispenser. A display on the counter indicates the number of doses either remaining in the dispenser or the number of doses which have been previously dispensed.

B. Tomaka Fails To Disclose Each Of The Elements Of Independent Claim 1.

Claim 1 is directed toward a fluid product spraying device and requires:

a fluid product dispensing pump (10) operating without propellant gas and without active spraying means and a spray head (20) to actuate said pump (10) manually, wherein said device comprises dispensing detection means (30) to

¹ A claim is anticipated only if each and every element as set forth in the claim is found either expressly or inherently in a single prior art reference. Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). In fact, the identical invention must be shown in as complete detail as contained in the claim. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

detect that a product dose has been dispensed, said detection means (30) being adapted to output a signal to inform the user that a dose of product has actually been dispensed by said pump; and

wherein said detection means comprises an expulsion detector adapted to detect the passage of the product in an expulsion channel of the spraying device.

Regarding claim 1, Appellants' respectfully submit that Tomaka fails to disclose at least the dispensing detection means recited in claim 1.

The Examiner alleges that FIG. 11 of Tomaka discloses a dispensing detection means to detect that a product has been dispensed.² In particular, the Examiner alleges that expulsion detector 40 outputs a signal to inform the user that a dose has been dispensed through an expulsion channel of the spraying device.³ Appellants respectfully disagree.

FIG. 11 of Tomaka shows an electrical block diagram of the counter. FIG. 11 indicates that the counter includes memory (ROM 54/RAM 56), a sound generator 58, a display 44, set buttons 48 and 50, thumb button 40, and a control unit 52. However, FIG. 11 fails to show that the counter is provided with an *expulsion detector* which *detects the passage of the product in an expulsion channel* of the spraying device, as required by claim 1. In particular, Tomaka does not provide a user with an indication that product has actually passed through the nozzle 16 from the main body 12. Rather, Tomaka indicates that a counter is incremented/decremented based upon the user pressing a thumb button 40 upon delivery of a dose.⁴ Further, Tomaka indicates that a sound is generated to alert a user that *the thumb button has been properly depressed*.⁵

² See Examiner's Answer, page 3.

³ *Id.*, citing Tomaka at col. 5, lines 8-12.

⁴ See Tomaka, col. 4, lines 47-49.

⁵ See Tomaka, col. 5, lines 8-16.

Therefore, Appellants respectfully submit that Tomaka does not disclose the detection means comprising an expulsion detector adapted to detect the passage of the product in an expulsion channel of the spraying device, as recited in claim 1.

Further, the Examiner alleges that col. 5, lines 8-12 of Tomaka, discloses that the detection means outputs “a signal to inform the user that a dose of product has actually been dispensed by said pump”. As noted above, this passage of Tomaka discloses that a sound is generated to alert a user that *the thumb button has been properly depressed*, not that a dose of product has actually been dispensed by said pump. In other words, according to Tomaka, a user could depress the thumb button do increment/decrement the counter without actually dispensing product. Further, a user could dispense product without depressing the thumb button to increment/decrement the counter. Therefore, Tomaka does not disclose that the sound generation informs a user that a dose of product has actually been dispensed by the pump.

Accordingly, for the reasons set forth above, Appellants respectfully submit that Tomaka fails to disclose each of the elements of claim 1, and further submit that claim 1 is patentable over the Examiner’s applied art.

II. CLAIMS 2, 4, 5 and 7-11 ARE REJECTED UNDER 35 U.S.C. §103(a) AS BEING UNPATENTABLE OVER TOMAKA IN VIEW OF ROCCI (U.S. 6,138,669).

With regard to the instant rejection, most of the arguments set forth in the Examiner’s Answer mailed August 25, 2010 are dealt with fully in Appellant’s Brief on Appeal, but Appellant requests that the following additional remarks be considered.

Claims 2, 4, 5, and 7-11 depend from claim 1. Because Tomaka fails to disclose each of the features of claim 1, and because Rocci fails to correct the deficiencies noted in Tomaka, Appellants respectfully submit that claims 2, 4, 5 and 7-11 are patentable at least by virtue of their dependency from claim 1.

Appellants respectfully submit that the proposed combination of Tomaka and Rocci would not have rendered claim 1 obvious for the reasons that follow, in addition to the reasons set forth in Appellant's Brief on Appeal.

A. The Examiner's Proposed Combination Of References Would Not Render The Outstanding Claims Obvious.

In the Examiner's Answer, the Examiner indicates that Appellant's arguments set forth in the Brief on Appeal were not persuasive. In particular, the Examiner argues that 1) the specific sensor disclosed by Rocci is similar to the sensor disclosed in the instant specification, and thus would be functional with a manual pump device as disclosed by Tomaka,⁶ 2) the detection means of Rocci would be an improvement to the device of Tomaka since the device of Rocci would not miscount if the pump was depressed when the medicant reservoir was empty,⁷ and 3) that pump actuated spray devices and metered dose inhalers (MDI) are analogous to one another, and have similar operating methods and outcomes.⁸

With respect to the Examiner's argument that the sensor disclosed in Rocci would be capable of functioning with the device of Tomaka, Appellants respectfully submit that *to one of*

⁶ See Examiner's Answer, page 5.

⁷ *Id.*

⁸ *Id.* at pages 5-6.

ordinary skill in the art, it would not be obvious that the sensor disclosed in Rocci would function in the device disclosed in Tomaka. Regardless of whether the sensor of Rocci would work, as alleged by the Examiner, the point that Appellant is making is that one skilled in the art would not have associated such a sensor disclosed uniquely in conjunction with an MDI device as disclosed in Rocci to detect fluid passage in a pump device as disclosed in Tomaka. In particular, the MDI device disclosed in Rocci requires a valve and propellant, wherein the sensor measures the pressure created by the propellant passing through the fluid passage. On the other hand, Tomaka does not use propellant. The only apparent rationale for using that a sensor as provided in Rocci with a manual pump device is presented in Appellants' own specification. Thus, the Examiner is clearly using improper hindsight reasoning based on the Appellants own disclosure to suggest the proposed combination of Tomaka and Rocci.²

Further, the Examiner argues that the detection means of Rocci would be an improvement to the device of Tomaka, since the device of Rocci would not miscount if the pump was depressed when the medicant reservoir was empty. Appellants respectfully submit that even, assuming, *arguendo*, that the Examiner is correct, the Examiner still has not evidenced why one of ordinary skill in the art would consider making this modification. Rocci discloses and MDI, wherein the sensor detects a pressure burst created during dispensing of a dose.¹⁰ With a pump device as disclosed in Tomaka, there is no pressure burst like that measured in Rocci.

² See *W.L. Gore & Assocs. v. Garlock, Inc.*, 721 F.2d 1540, 1551, 220 U.S.P.Q. 303, 312-13 (Fed. Cir. 1983); see also *Medtronic, Inc. v. Cardiac Pacemakers, Inc.*, 721 F.2d 1563, 1567, 220 U.S.P.Q. 97, 101 (Fed. Cir. 1983).

¹⁰ See Rocci, col. 5, lines 13-17.

Accordingly, one of ordinary skill in the art would not look toward Rocci for disclosing a sensor to modify Tomaka.

Further, with respect to the Examiner's argument that a pump actuated spray device and an MDI are analogous, Appellants respectfully disagree. Pump actuated spray devices and MDI devices operate using fundamentally different characteristics. In particular, MDI devices contain propellant in a pressurized canister and used with metered dose valve to deliver a burst to dispense the medicant, while pump actuated spray devices rely on a vacuum created by the release of an actuation of the main body and nozzle towards one another to dispense a product. Thus, the devices in Tomaka and Rocci have completely different structural requirements for dispensing a product, with the MDI device of Rocci being much more complex than the pump actuated device of Tomaka. Accordingly, the devices in Tomaka and Rocci are not analogous to one another, as alleged by the Examiner. As the devices in Tomaka and Rocci are not analogous to one another, it would not have been obvious to modify Tomaka to include *only* the sensor disclosed in Rocci, without also including the valve and pressurized canister. Appellants note that the Supreme Court has required that the Examiner's rationale for modifying Tomaka must be made explicit.¹¹ Here, the Examiner fails to provide a rationale why one of ordinary skill in the art would modify Tomaka to incorporate the sensor of Rocci alone.

Accordingly, Appellants respectfully submit that the Examiner's proposed combination of references would not render the outstanding claims obvious.

¹¹ See *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) ("the rationale to modify a reference to support a *prima facie* case of obviousness cannot be sustained by mere conclusory statements, but must be supported by rational underpinnings and articulated reasoning.")

CONCLUSION

For the above reasons as well as the reasons set forth in Appeal Brief, Appellant respectfully requests that the Board reverse the Examiner's rejections of all claims on Appeal. An early and favorable decision on the merits of this Appeal is respectfully requested.

Respectfully submitted,

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